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No. 94-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

S-1 AND S-2, ET AL.,

Petitioners,

v.

STATE BOARD OF EDUCATION OF NORTH CAROLINA, ET AL.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

PETITIONERS' REPLY MEMORANDUM

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Respondents' Brief in Opposition fails to come to grips with the principal contention in the Petition: that there is a split in authority as to whether this Court's decision in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), overruled, *sub silentio*, more than a decade of law in virtually every federal circuit allowing an award of attorney's fee under a catalyst theory of recovery. The court of appeals below, in a 7-6 *en banc* ruling, held that *Farrar* had precisely that effect, contrary to every other circuit to have reached the question. As we now show, respondents' Opposition does not seriously question the split in authority over this important issue, and review should be granted.

1. Respondents claim that review should be denied on the ground that, even under a catalyst theory, petitioners would not be entitled to a fee. In short, respondents assert that the Fourth Circuit's holding may be read to apply only to cases in which the benefit catalyzed by the suit occurred after the suit had been held to be moot. However, the question whether a suit deemed moot for prudential reasons, as was this case, can act as a catalyst is a factual inquiry that has already been resolved favorably to petitioners by the district court (Pet. App. 44a-45a), and although questioned briefly in Judge Wilkinson's panel dissent (Pet. App. 30a), was not the basis of the *en banc* ruling. That ruling held that *Farrar* had interred the catalyst approach (Pet. App. 5a) and, by adopting Judge Wilkinson's panel dissent (*see* Pet. App. 28a n.2), noted that Fourth Circuit was parting company with other circuit courts on that question.

Petitioners' district court victory against all defendants -- including respondents here -- was prominently mentioned in a Letter Ruling issued by the United States Department of Education's Office of Special Education and Rehabilitation Services ("OSERS"), which specifically embraced petitioners' view of the law (Pet. App. 53a). The district court found that the OSERS Letter Ruling began a chain of events leading to changes in North Carolina law that fully vindicated petitioners' position (Pet. App. 44a), entitling them to an award of fees against respondents.

Thus, respondents' principal argument -- that the Fourth Circuit's decision applies to a narrow category of cases "and is not in conflict with the decisions of other courts of appeal" (Opp. 12) -- is plainly at odds with the ruling below. Moreover, if there were any question that the Fourth Circuit's *en banc* ruling rejected outright the catalyst theory, that question is now foreclosed by the Fourth Circuit's recent decision in *Arvinger v. Mayor & City Council of Baltimore*, ___ F.3d ___, 1994 U.S. App. Lexis 19693, at *18-*20 (4th Cir. Aug. 1, 1994), where the plaintiff sought fees on the ground that his suit had catalyzed a benefit received from the

defendant *prior to* dismissal of the suit. The court of appeals reversed the fee award in specific reliance on the decision below, which it read as broadly rejecting the catalyst theory. *See also id.* at *21 (Restani, J., concurring)(disagrees that *Farrar* rejected catalyst approach, but bound to reverse fee award because of *en banc* decision in *S-1*).*

2. Relying on *Hewitt v. Helms*, 482 U.S. 755 (1987), respondents maintain that the result below can be defended on the ground that petitioners did not benefit from the modifications in North Carolina law that their suit had induced. As we explained in the Petition (at 14 n.2), petitioners achieved a direct benefit from the changes in law. Unlike the situation of the prisoner in *Hewitt v. Helms*, the local school officials here, with whom petitioners maintained an ongoing relationship, were placed under a continuing obligation to provide a lawful due process hearing to petitioners in the future. Thus, absent the Fourth Circuit's wholesale renunciation of the catalyst theory, petitioners would be entitled to a fee award for the concrete benefit they obtained from their suit against respondents.

CONCLUSION

For the reasons stated above and in the Petition, the petition for a writ of certiorari should be granted.

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* In addition, we note that two other circuits have recently rejected the Fourth Circuit's reasoning, which those courts viewed as a general repudiation of the catalyst theory. *See Zinn v. Shalala*, ___ F.3d ___, 1994 U.S. App. Lexis 24100, at *6-*8 (7th Cir. Sept. 2, 1994)(specifically rejecting the decision below); *Beard v. Teska*, ___ F.3d ___, 1994 U.S. App. Lexis 19142, at *25-*26 (10th Cir. July 26, 1994)(same); *see also Little Rock School Dist. v. Pulaski County Special School Dist., No. 1*, 17 F.3d 260, 263 n.2 (8th Cir. 1994).

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